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No. 89-1695

In The
*Supreme Court of the United States*
October Term, 1989

LAW ENGINEERING, INC.,
***Petitioner,***
v.
GEORGETOWN STEEL CORPORATION and
UNION CARBIDE CORPORATION,
***Respondents.***

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

# RESPONDENTS' BRIEF IN OPPOSITION

Charles Porter
***(Counsel of Record)***

James B. Moore, Jr.
E. Russell Jeter, Jr.
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800
***Counsel for Respondents***

June 1, 1990

Thomas S. Tisdale, Jr.
Stephen P. Groves
YOUNG, CLEMENT, RIVERS &
TISDALE
Post Office Box 993
Charleston, SC 29402
(803) 577-4000

*Counsel for Respondents*

## QUESTIONS PRESENTED

1. Was the Fourth Circuit correct in holding that Law had a duty to determine the suitability of slag for its proposed use where it is undisputed that Law designed the foundation, knew what structure would be built, and opined on the suitability of slag as backfill?

2. Was the Fourth Circuit correct in holding that the failure to alert Law as to slag's possible problems was not contributory negligence where the District Court misunderstood that Law had a duty to determine the suitability of slag, and where the District Court found Law had corporate knowledge of slag's characteristics?

3. Was the Fourth Circuit correct in holding there was no agency relationship where UCC did not control GSC, and GSC acted only to carry out its contractual obligations to UCC?

## PARTIES TO THE PROCEEDINGS BELOW

1. Law Engineering, Inc., Petitioner.

Law Engineering, Inc., was formerly known as Law Engineering Testing Company, and was so identified in the proceedings in the District Court and the Court of Appeals.

2. Georgetown Steel Corporation, Respondent.*

3. Union Carbide Corporation, Respondent.*

4. Pittsburgh Testing Laboratory, Inc.

Respondents believe, and hereby notify the Clerk pursuant to Supreme Court Rule 12.4, that Pittsburgh Testing Laboratory, Inc., has no interest in the outcome of this petition.

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*There are no parent or subsidiary corporations of Georgetown Steel Corporation or Union Carbide Corporation required to be listed under Supreme Court Rule 29.1.

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## STATUTORY PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the S. C. Code Regs, §49-12 and §49-14, are set forth in respondents' Appendix.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

# RESPONDENTS' BRIEF IN OPPOSITION

The respondents Georgetown Steel Corporation ("GSC") and Union Carbide Corporation ("Union Carbide"), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That decision is reported, without opinion, at 892 F.2d 1041 (1990).

## STATEMENT OF THE CASE

This case concerns the destruction of a plant built by Union Carbide on land furnished by Georgetown Steel. It is uncontested that the plant was destroyed by expansion of the slag foundation and that such foundation was recommended and approved by the professional soils engineer, Law Engineering ("Law").

Slag expands when certain types of lime, one of which was present here, comes in contact with water. This phenomenon is well known to the industry and to Law. Law's engineer, Steve Blevins, was told of the presence of lime and other heavy metals in this slag and knew the fill was being used at a site on the bank of a river.

Law, pursuant to a contract to provide a subsurface investigation of the plant site, issued a report on March 24, 1980, after a full investigation, in which its first recommendation was to build the air-separation plant on the slag currently in the ground. This report placed GSC's suggestion, of using pilings as a foundation, as a last alternative. The only refinement of the existing slag/soil that Law required was to compact the slag by dropping a large headache ball to eliminate voids. At the time Law first recommended using slag, it is undisputed that it had not tested the slag, it had not spoken to GSC about the slag, it had not investigated the slag's "suitability" for swelling, and it had not researched the literature in its own library about slag. In fact, it is undisputed that Law knew at that time that slag had expansive qualities and was unsuitable as engineered fill, and there was literature available in its own library about this characteristic of slag.

Later, after concerns about settlement resulted in an amended report, Law orally issued its final recommendation of a slag fill and confirmed that recommendation in one paragraph in a September 9, 1980, proposal. There Law again recommended slag as a "suitable" fill for the plant, provided it verified the size of the slag particles for compaction purposes. This recommendation was made despite Law's undisputed knowledge that the slag was not "suitable."

The District Court found that the question of slag's expansiveness did not fall in the scope of Law's duties; therefore, it denied GSC recovery on express and implied warranty grounds. The Fourth Circuit reversed this conclusion of law on the basis that Law contracted to undertake a full-scale, general, soil investigation; knew the type building which would be sited over the slag; recommended slag on two occasions; and supervised the installation of the slag; therefore, the suitability of slag in all its respects was part and parcel of Law's duty to GSC and Carbide. Since the slag was indisputably unsuitable, the Fourth Circuit correctly held Law breached its warranty and acted negligently. The Fourth Circuit was further correct in also reversing the District Court on the question of Law's duty to investigate slag and on the issue of contributory negligence.

Law has not identified any disputed fact which the Fourth Circuit relied upon in contravention of the clearly erroneous standard. And in only one instance does Law challenge the Fourth Circuit's characterization of a document. Instead, Law disputes the ultimate conclusions the Fourth Circuit made in connection with "duty" and "contributory negligence."

With respect to the issue of agency, Union Carbide agreed to lease certain property within the confines of the GSC plant site upon which the oxygen plant would be built. GSC agreed to provide the property; to have a soils investigation report prepared by an engineering firm; to clear, grade, and level the site; to make suitable provisions for drainage of surface and rain water; and to provide a site with a specific load-bearing capacity. Furthermore, GSC agreed to provide Carbide the necessary electrical connections

plus piling and trestle connections from the Carbide plant to the GSC plant. This contract bound Carbide and GSC to certain obligations; however, it did not create an agency relationship.

When GSC provided Union Carbide with a copy of Law's March 24, 1980, report, Carbide was concerned about the low tolerance of its equipment for settlement. Law then suggested an alternate approach. Later, during the actual backfill operation, Law tested the slag for compaction. Law then issued a second report, concerning the ability of the slag to support the design weight.

The District Court found an agency relationship in the requirement on GSC to prepare the plant site, and the fact that Law issued an amended second report after GSC contacted Law at Carbide's request. The Fourth Circuit correctly determined that those facts established nothing more than GSC's efforts to comply with its contract with Carbide to provide a plant site meeting Carbide's specifications.

## REASONS THE PETITION SHOULD BE DENIED

1. **The petition fails to meet the criteria of Supreme Court Rule 10.1 and presents no question whose resolution will have an impact beyond the facts and parties before the Court.**

The petition presents no question arising under the Constitution or the statutes of the United States. It presents no question involving a conflict between the circuits, nor does it present a conflict over a federal question with a state court of last resort. No important

question of federal law has been presented which has not been decided by the Court.

The petition merely argues a case for the correction of alleged errors in the decision of the Fourth Circuit, and seeks another hearing for "a defeated party." Magnum Co. v. Coty, 262 U.S. 159, 163 (1923). However, the petition does not present any questions whose resolution will have an impact beyond the particular facts and parties before the Court.

Since the premise of the petition is that the decision in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), was correctly decided, the petition does not advocate any modification in that standard. Petitioners acknowledge that the Court has already spoken authoritatively and clearly in this area.

Law does not have available to it the argument that guidance to the lower courts warrants reiterating Anderson's holding. Since Anderson, the Court has revisited this area several times which has served to emphasize its previous ruling. E.g., Amadeo v. Zant, 486 U.S. 214 (1988); Icicle Seafoods, Inc., v. Worthington, 475 U.S. 709 (1986).

The petition presents an issue of the application of an accepted legal standard to the facts in a suit governed by state law. There is no claim that the Fourth Circuit applied an incorrect standard, and this case presents only the question of whether that court misapplied the correct standard. Law's effort to change that result will have no effect on the large volume of other appeals in which the decision rests on facts unique to that particular case. Law is attempting to entice the Court into a dispute over a unique set of facts

and the application of evolving South Carolina law to those facts. The case is a diversity action and the role which Law essentially asks this Court to play is to sit as the Supreme Court of South Carolina.

Law has availed itself of two opportunities to argue the "clearly erroneous" standard, including an opportunity to argue the very error alleged in the petition.[1] No member of the Fourth Circuit voted to hear this matter en banc, and the unanimous denial of the Petition for Hearing En Banc indicates there is no perceived injustice. The judicial system has provided Law an opportunity for review, and Law has given no compelling reason justifying the expenditure by the Court of its limited resources on this case.

2. **Where Law designed the foundation, knew what structure would be built, and opined on slag's suitability as backfill, Law had a duty to determine the suitability of slag for its proposed use.**

Contrary to Law's position, the Fourth Circuit did not weigh evidence or determine credibility in reversing the District Court. Based on the District Court's order, Law's testimony and undisputed facts, the Fourth Circuit reached a different conclusion concerning Law's duty under its contract. The Fourth Circuit was correct in finding a duty to determine the "suitability" of slag as a backfill where Law designed the foundation, knew what

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[1]Petitioner argued the "clearly erroneous" standard in its brief as appellees before the Court of Appeals, and made essentially the identical arguments presented to this Court in the Petition for Rehearing and Hearing En Banc.

structure was going to be built, and opined that slag was "suitable" as backfill. Even Law's expert witness testified that Law had to decide that the material going under the structure was "suitable." The Fourth Circuit did not err in reversing the District Court's order on the existence of a duty.

The reasons the Fourth Circuit gave for concluding that Law had a duty to test the slag, leave the definite and firm conviction that a mistake had been committed by the District Court. United States v. United States Gypsum Co., 333 U.S. 364 (1948). Law was a professional geotechnical and materials engineering company hired for its expertise. They were retained to design the foundation and in so doing, specifically approved the use of GSC's slag. Later, Law approved pure slag as a backfill material. However, Law's chief engineer, who was responsible for the foundation design and who recommended the slag twice, admitted that he was not qualified by experience or training to deal with slag, he knew nothing about the expansive properties of slag, and he had no prior experience with slag. Furthermore, at the time Law was recommending the unsuitable slag, it had corporate knowledge that slag had expansive qualities and could cause problems if used as backfill material. Since Law's recommendation of slag necessarily meant the slag would not swell and destroy the plant, and since Law failed to conduct a literature search, failed to test the slag for expansiveness, and failed to inform GSC the slag swelled (Petition at Dist. Ct. Order, ¶ 40, p. 680a), its opinion was clearly negligently rendered and in violation of its warranty.

Each of the factors the Fourth Circuit relied upon in finding a legal duty were undisputed. These factors

were drawn either from the District Court's order or from Law's own testimony and documents. Specifically, Law's design responsibilities were contained in the February 8, 1980 proposal Law drafted, and in the February 12, 1980 contract Law drafted. Law recommended and approved the use of a mixed slag in its March 24, 1980 report (Petition at Dist Ct. Order, ¶ 53, p. 45a), approved the use of pure slag in its September 1980 proposal (Petition at Dist. Ct. Order, ¶ 58, p. 47a) and observed slag's use as a structural fill during construction (Petition at Dist. Ct. Order, ¶¶ 58 and 61, pp. 47a-48a). Steve Blevins, the chief soils engineer for Law who reviewed Law's slag recommendations (Petition at Dist. Ct. Order, ¶ 52, p. 45 and ¶ 58, p. 47a), admitted his lack of knowledge, experience or qualifications for dealing with slag. (Petition at Opinion, p. 21a).

The District Court failed to recognize that in South Carolina, a professional engineer acts unlawfully when he signs a report dealing with a subject matter to which he lacks competence by virtue of education or experience. S. C. Code Regs. 49-14(C)(1976). In the event the engineer lacks competence in an area, he has a duty to turn performance over to qualified associates, consultants or employees. Id. 49-14(B). Since these regulations are intended to "safeguard the . . . property . . . of the public . . .," id. 49-12, the violation of this standard is negligence per se. Price v. Lowman, 373 F.2d 390 (4th Cir. 1967); Burriss v. Texaco, Inc., 361 F.2d 169 (4th Cir. 1966).

The District Court concluded that Law had imputed knowledge of the expansiveness of slag and its destructive character before and at the time it issued its recommendations. (Petition at Dist. Ct. Order, ¶ 77, p.

52a; ¶ 10, p. 57a; ¶ 39, p. 68a). Law never cross-appealed the District Court order and is bound by its adverse findings and conclusions.

Law has not identified any disputed fact which the Fourth Circuit relied upon in contravention of the clearly erroneous standard. And in only one instance, discussed below, does Law challenge the Fourth Circuit's characterization of a document. Instead, Law disputes the ultimate conclusions the Fourth Circuit made in connection with "duty."[2]

The only characterization Law contests is whether the September 9, 1980 letter about processed slag being "suitable for use in the backfill" meant suitable for compaction or suitable for expansiveness. (Petition, p. 4, fn.2). Law misreads the Fourth Circuit opinion which never entered the fray about whether or not Law meant suitability for compaction. The point in the Fourth Circuit opinion was that, regardless of what "suitability" meant, it was clearly known to Law that the slag would be used as fill under the air separation plant in a foundation which Law had designed or to which it had approved all modifications. Indeed, Law supervised the pure slag's placement and compaction. Furthermore, Law knew that the slag was the same steel slag which, when mixed with soil, Law had

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[2] Law, as part of the "duty" discussion, argues the District Court's determination of the parties' intent is entitled to special weight as it was based on the credibility of witnesses. Petition, p. 5. That is incorrect; the District Court based that conclusion on the absence of the word "expansiveness" in the contractual language and on testimony that Rishel told Law he had been successful with slag. (Petition at Dist. Ct. Order, ¶ 50, p. 72a). Both of these factual findings were accepted by the Court of Appeals. Thus, credibility is not an issue.

recommended as a foundation in March. The Fourth Circuit was unable to accept Law's posture given that Law recommended the use of slag, allowed its use, and called the slag "suitable." Even if, as Law argues, Georgetown did not ask if this slag would swell if used, Law must have the design responsibility for its use in Law's foundation design. Regardless of the issue of the characterization of this language, Law was still approving foundation materials and modifications pursuant to its February 1980 undertaking. As Law's own expert witness testified, Law had to decide the material was "suitable" to go under the building.

Petitioner suggests Law's duties in the contract to design the foundation came to an end in August 1980, before the foundation was even constructed. (Petition, p. 4, fn. 2). Obviously, the District Court erred in this regard. The court apparently reasoned that the second contract was in effect a novation of the first contract. This reasoning was in error as there was no novation or release of the duties of the first contract. Those duties of proper design were alive and owing to GSC throughout September and October, 1980, and thereafter. The September recommendation of pure slag was different from the March report only in that the slag/soil mixture could be replaced with a pure slag mixture in order to assure adequate compaction and prevent damage from settlement. As such, this September recommendation merely amended and amplified the March report. Edward Pinckney Associates, Ltd. v. Carver, 364 S.E.2d 473, 474-475 (S.C. App. 1987).

The District Court's conclusion that Law's contract did not cover the expansiveness of slag because the agreement fails to mention expansiveness (Petition

at Dist. Ct. Order, ¶ 50, p. 72a), was clear error. Law undertook a full-scale, general soil investigation pursuant to the February contract. The burden should not be on the non-expert client to anticipate all problems and expressly provide for them in the contract. That is what they hire the expert to do and what the expert is supposed to know. Where a company undertakes a full-scale investigation, the burden should be on the expert to specifically exclude any areas it will not cover in its report.[3] There were no such exclusions in this report.

The second reason the District Court concluded that expansiveness was beyond the contract's scope was that Rishel had indicated a lack of concern about slag. (Petition at Dist. Ct. Order, ¶ 50, p. 72a). As the Fourth Circuit noted, Law could not rely on these statements because of its corporate knowledge of slag's expansive qualities coupled with its engineer's lack of familiarity with slag. (Opinion, Petition, p. 21a). These were enough to put Law on notice to inquire further before recommending a slag foundation. Moreover, this

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[3] See J.A. 362. For example, a contractor who agrees to perform construction, foundation or site work and obtain a required result, is liable unless he specifically excludes problems in his contract. See Newcomb v. Schaeffler, 279 P.2d 409, 411 (Colo. 1955); Superintendent of Public Schools v. Bennett, 27 N.J.L. 513, 72 Am. Dec. 373 (1859); Cramp & Co. v. Central Realty Corp. of Philadelphia, 110 A. 763, 765 (Pa. 1920); White v. Mitchell, 213 P. 10, 12 (Wash. 1923). Furthermore, the suitability of the very material that Law proposed for the foundation is such an obvious term of the contract that the courts will imply the terms necessary to carry out the intent of the contract. S. Williston, A Treatise on the law of Contracts § 610B (W. Jaeger 3d ed. 1961). Finally, Law's contract must be strictly construed against it, as the author. Charles v. West, 152 S.E. 644, 646 (S.C. 1930).

conversation occurred in October (Petition at Dist. Ct. Order, ¶ 62, p. 48a), long after the scope of the February contract had been set.

Was the "suitability" of this slag for this particular site and use within the scope of Law's contract? The answer is it has to be when Law "recommends" slag as an "appropriate" foundation approach. If an expert recommends a fill as being "appropriate," it must mean that the fill is "suitable." South Carolina law has often recognized that recommendations and representations carry with them a burden of accuracy. South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 346 S.E.2d 324, 326 (1986). Law's own expert witness testified that Law had to decide that the material going under the structure was suitable. Furthermore, the District Court's order inferred that where an engineering firm is retained to perform a full-scale soil investigation, it has a duty to conduct a literature search to determine if slag was suitable for use as an engineered fill. (Petition at Dist. Ct. Order, ¶ 9, p. 56a). The District Court misunderstood the scope and nature of Law's role.

Law seeks to entice this Court to accept the role of making policy for the South Carolina courts in an evolving area of state law. Law argues that South Carolina law would not allow the imposition of a duty independent of the terms of its contract, citing and quoting from Gilliland v. Elmwood Properties, 375 S.E.2d 342, 345 (S.C. App. 1988) (Petition, p. 6-7). The Court of Appeals decision in Gilliland was contrary to previous case law, and on April 30, 1990, the Supreme Court of South Carolina reversed that portion

of the Court of Appeals decision cited by petitioner.[4] This reversal places Gilliland in the line of cases which have found a duty to act reasonably, independent of the contract terms. Terlinde v. Neely, 271 S.E.2d 768 (S.C. 1980) (violations of industry standards); Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730 (S.C. 1989) (construction of structure posing risks of physical harm); Winburn v. Insurance Co., 339 S.E.2d 142 (S.C. App. 1985) (negligent misrepresentation inducing an investment or contract); and Kincaid v. Landing Dev. Corp., 344 S.E.2d 869 (S.C. App. 1986) (violations of building codes).[5]

In summation, the petition presents no disputed fact relied upon by the Fourth Circuit. The only claim is that the Fourth Circuit mischaracterized one document; however, it is clear that, in fact, the Fourth Circuit never characterized the document at all. The only inference that can be drawn from the undisputed facts was that Law was hired to design the foundation, that in designing the foundation Law approved the use

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[4] The Supreme Court stated, "We disagree with the Court of Appeals' holding that Elmwood has failed to plead and/or demonstrate facts showing a tort duty existing independent of the contract." Gilliland v. Elmwood Properties, slip op. 31, 34 (S.C. April 30, 1990). The Supreme Court dismissed the architect malpractice claims, but only for lack of evidence. The Supreme Court found that the negligent misrepresentation claims should have survived summary judgment.

[5] Law also quotes Crawford v. Powers, 419 F. Supp. 723 (D.S.C. 1974) at page 6 of its Petition. Crawford is an insurance claim case in which a district court interpreting state law cited no South Carolina state court decision supporting the quoted language. Crawford has never been cited by a state or federal court. In light of the Gilliland line of cases, Crawford is unpersuasive on this point.

of slag, that Law supervised the installation of the slag, and that Law owed a duty to determine the "suitability" of the slag for the use it was intended.

### 3. There Was No Contributory Negligence Barring Recovery In Negligence Against Law.

While Law claims the difference in results on the contributory negligence issue as it pertained to PTL and Law was inconsistent, in fact the dramatically different roles the two companies performed makes the result consistent. The District Court's error was premised on its complete failure to recognize that Law had a duty to determine the "suitability" of slag, as discussed in argument 2, supra.

PTL performed its work in 1979, before the oxygen separation plant was contemplated by Georgetown Steel or Union Carbide. (Petition at Dist. Ct. Order, ¶ 32, p. 66a). Indeed, PTL had no knowledge of any structure under which the slag would be used. (Petition at Dist. Ct. Order, ¶26, p. 64a). Georgetown Steel paid PTL $400 to perform tests which Georgetown Steel specified. Thus, PTL's undertaking was narrow, it performed the tests correctly, and it reported the results accurately. PTL was negligent in volunteering an opinion for which it had no basis. (Petition at Dist. Ct. Order, ¶ 11, p. 58a).

Law's knowledge and duty was on a completely different scale. Law knew Georgetown Steel and Union Carbide were planning to build a multi-million dollar plant, and agreed to furnish foundation solutions for the plant. The scope of Law's engagement was general and far-reaching in that it was the designer of the plant's

foundation, its involvement lasted almost one year, it saw the PTL report, it recommended the use of a slag foundation, and it placed a man on site to supervise the installation of the slag.

Georgetown Steel was not an expert on the use of slag as a fill, and its concerns or experience would have carried little weight with professional soil engineers. The duty to determine the suitability of the foundation materials lay with the designer who proposed those materials.

The District Court failed to recognize the duty Law had to investigate the slag, and it carried this error over into its analysis of contributory negligence. The District Court speculated that Law could have tested for expansiveness, conducted a literature search, or made inquiries about the slag's characteristics if GSC had spoken, but this ignored the point that Law already had a duty to perform each of those tasks before recommending the slag as a foundation material. Thinking Law had no duty to perform those tasks, the District Court was looking to GSC to alert Law to the need to investigate the slag. The obvious error in this reasoning is that Law already had the duty to investigate. The District Court's misunderstanding of the role of soils engineers in general and their role in this case caused it to err when analyzing contributory negligence.

The District Court also clearly erred in finding contributory negligence because Law already knew that which Georgetown Steel's information might lead to. As of the early 1970's, Law's engineers knew "that slag had expansive qualities and that it could cause problems if used as an engineered fill." (Petition at Dist. Ct.

Order, ¶ 77, p. 52a). In addition, Law had available in its library a 1969 article about buildings which had been damaged by expansive steel slag. (Petition at Dist. Ct. Order, ¶ 73, p. 51a). As the District Court concluded, "Admittedly, Law had knowledge of the expansive qualities of slag . . . ." (Petition at Dist. Ct. Order, ¶ 39, p. 68a). Under South Carolina law, the knowledge of an officer or agent of a corporation obtained in the course of their official duties is imputed to the corporation. (Petition at Dist. Ct. Order, ¶ 10, p. 57a). Finding the case at bar a "compelling case" for imputing knowledge to the corporate defendants (Id.), the District Court correctly concluded Law had knowledge. Law never appealed that conclusion. Where the District Court erred was that it focused on the individual knowledge of the project engineer, rather than recognizing that Law's corporate knowledge barred any contributory negligence.

Law argues the ultimate conclusion reached by the Fourth Circuit, but it fails to identify disputed facts relied upon by the appellate court. The Fourth Circuit was correct in concluding Law's opinion on the suitability of slag was the proximate cause of the plant's destruction.

### 4. There was no evidence that Georgetown acted as Union Carbide's Agent.

The Fourth Circuit correctly determined that the District Court improperly concluded an agency relationship existed between Georgetown and Union Carbide. The Fourth Circuit, utilizing the "clearly erroneous standard," found that neither Union Carbide nor Georgetown had any intent whatsoever for

Georgetown to act as Union Carbide's agent. Law, in its Petition, however, attempts to create an issue of fact where none exits. The District Court proceedings, contrary to Law's arguments, did not produce any evidence of any agency relationship between Union Carbide and Georgetown. The District Court proceedings did, however, demonstrate that Georgetown and Union Carbide were merely contracting parties equally performing their respective obligations under the contract. (Petition at Opinion, p. 27a).

Under South Carolina law, the existence of an agency relationship must be clearly established. McCall v. Finley, 362 S.E.2d 26, 29 (S.C.App. 1987); Paramount Fund, Inc. v. Cusaac, 319 S.E.2d 354, 355-356 (S.C.App. 1984). In order to prove an agency relationship, a party must demonstrate that the alleged principal has the power to control the conduct of the alleged agent. See Fernander v. Thigpen, 293 S.E.2d 424, 426 (S.C. 1982). See also, Sharpe v. Bradley Lumber Company, 446 F.2d 152, 153, (4th Cir. 1971). The existence of an agency relationship depends initially on the principal's intent that the agent act for him in a fiduciary capacity and the agent's concomitant intent to act for the principal. Courtney v. Remler, 566 F. Supp. 1225, 1230 (D.S.C. 1982), aff'd., 745 F.2d 50 (4th Cir. 1984). Since Union Carbide had no intent that Georgetown act on its behalf, there, of course, could not be an agency relationship. Id. Furthermore, an agency relationship is distinguished by the principal's power to control the conduct of the agent, Thigpen, 293 S.E.2d 424, 426, as distinguished from the principal's power only to control the result of the agent's performance. Control of the ultimate result more properly characterizes the status of an "independent contractor" relationship. See Springs Cotton Mills v.

Machinecraft, Inc., 156 F. Supp. 372, 378 (D.E.D.S.C. 1947). The evidence produced in the District Court indicated that was the precise relationship between Union Carbide and Georgetown.

The evidence established that Georgetown contracted with Law for a soils investigation of the site. (Petition at Dist. Ct. Order ¶ 50, p. 43a). That contract existed between Georgetown and Law. Id. Georgetown was acting upon its own to comply with the provisions of the contract it had with Union Carbide.

Pursuant to the agreement with Georgetown, Law prepared a report containing its findings. Id. at ¶¶ 52-53, p. 45a. Georgetown provided a copy of the report to Union Carbide. Id. at ¶ 54, pp. 45a-46a. After reviewing the report, Union Carbide advised Law that the plant could only tolerate minimal differential settlement. Id. at ¶ 54, p. 46a. Law amended the report to address Union Carbide's concerns. Id. After the report was issued, Georgetown retained Law to oversee the site preparation for the Union Carbide plant. Id. at ¶¶ 58-60, p. 47a. Pursuant to that contract, Law performed certain tests on the Georgetown slag. Id. at ¶ 66, p. 49a. The second Law report was later modified concerning design-bearing pressure. Id.

The District Court determined the existence of an agency relationship based upon the slim facts that (a) Georgetown was required to prepare the site, and (b) at Union Carbide's request, Georgetown contacted Law once the second report was issued. (Petition at Opinion, p. 28a; Petition at Dist. Ct. Order, ¶¶ 53-55, p. 73a). Those facts, however, only established that Georgetown was attempting to comply with the

contract it had with Union Carbide to prepare the site to Union Carbide's specifications. (Petition at Opinion, pp. 27a, 28a). Union Carbide, by requesting assurances from Law through Georgetown, was not exerting control over Georgetown so as to establish an agency relationship, Courtney, supra, but only making sure the site was prepared according to the contract. Id. See, Vance Trucking Co. v. Canal Insurance Company, 249 F. Supp. 33, 37 (D.S.C. 1966), aff'd., 395 F.2d 391 (4th Cir.), cert. denied, 393 U.S. 845 (1968). Those assurances are the type anticipated by the Uniform Commercial Code as between two merchants in an arms-length transaction. Id. at p. 27a.

Moreover, since an agent is appointed by a principal as his representative and to whom the principal confides management of some business to be transacted in the principal's name or on his account, Peeples v. Orkin Exterminating Co., 135 S.E.2d 845, 848 (S.C. 1964), there can be no agency relationship herein between Union Carbide and Georgetown. Any contact between Georgetown and Law, even if on behalf of Union Carbide, was solely a reasonable means by which Georgetown could ensure that the site would be prepared to the required specifications and Georgetown could comply with the contract. Id. at pp. 27a-28a. Cf. Jones v. Bates, 127 S.E.2d 618, 619 (S.C. 1962). The mere fact that one of the contracting parties is able to give general directions as to what is to be done, without any control over the method or means of doing it, does not create an agency relationship. See Chatman v. Johnny J. Jones Exposition, 47 S.E.2d 302, 304-305 (S.C. 1948). Agency is not created where such general intention does not appear, though some elements of agency may exist. Pennell & Harley v. Hearon, 168 S.E. 188, 190 (S.C. 1933). There was no intention, whether

general or limited, for an agency relationship to exist between Union Carbide and Georgetown.

Finally, the District Court could not have properly determined an agency relationship between Union Carbide and Georgetown under an implied or inferred agency theory. Cf. Bankers Trust of South Carolina v. Bruce, 323 S.E.2d 523, 532 (S.C.App. 1984); Gathers v. Harris Teeter Supermarket, Inc., 317 S.E.2d 748, 752 (S.C.App. 1984). There was no evidence introduced by the parties which demonstrated that Union Carbide had, through either affirmative conduct or conscious and voluntary inaction, represented to anyone that Georgetown was its agent. McCall v. Finely, supra; Watkins v. Mobile Oil Corp., 352 S.E.2d 284, 287 (S.C.App. 1986).

The Fourth Circuit correctly found no agency relationship between Union Carbide and Georgetown. Its decision should stand as rendered.

## Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES PORTER
(Counsel of Record)

E. Russell Jeter, Jr.
James B. Moore, Jr.
McNAIR LAW FIRM, P.A.
P. O. BOX 11390
COLUMBIA, SC 29211
(803) 799-9800

Thomas S. Tisdale, Jr.
Stephen P. Groves
YOUNG, CLEMENT, RIVERS & TISDALE
P. O. BOX 993
CHARLESTON, SC 29402
(803) 577-4000

Counsel for Respondents

Columbia, South Carolina

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# APPENDIX

S. C. Code Regs. 49-12 and 49-14

49-12. Preamble.

In order to safeguard the life, health, property and welfare of the public and to establish and maintain a high standard of integrity, skills, and practice in the profession of engineering and land surveying, the following Rules of Professional Conduct are promulgated in accordance with the Code of Laws of South Carolina 1976, § 40-21-110, and shall be binding upon every person holding a certificate of registration as a Professional Engineer or Land Surveyor and on all partnerships or corporations or other legal entities authorized to offer or perform engineering or land surveying services in this state.

The Rules of Professional Conduct as promulgated herein are an exercise of the police power vested in the South Carolina State Board of Engineering Examiners by virtue of the acts of the legislature, and as such the South Carolina State Board of Engineering Examiners is authorized to establish conduct, policy, and practices in accordance with the powers herein above stated.

All persons registered under the Code of Laws of South Carolina 1976, Title 40, Chapter 21, are charged with having knowledge of the existence of those Rules of Professional Conduct, and shall be deemed to be familiar with their several provisions and to understand them. Such knowledge shall encompass the understanding that the practice of engineering is a privilege, as opposed to a right, and the registrant shall be forthright and candid in his statements or written response to the Board or its representatives on matters pertaining to professional conduct.

49-14. Competency for Assignments.

The Engineer or Land Surveyor shall perform his services only in the areas of his competence.

A. The Engineer or Land Surveyor shall undertake to perform engineering or land surveying assignments only when qualified by education or experience in the specific technical field of professional engineering or land surveying involved.

B. The Engineer or Land Surveyor may accept an assignment requiring education or experience outside of his own field of competence, but only to the extent that his services are restricted to those phases of the project in which he is qualified. All other phases of such projects shall be performed by qualified associates, consultants, or employees.

C. The Engineer or Land Surveyor shall not affix his signature and/or seal to any engineering or land surveying plan or document dealing with subject matter to which he lacks competence by virtue of education or experience, nor to any such plan or document not prepared under his direct supervisory control.

D. In the event a question arises as to the competence of an Engineer or Land Surveyor to perform an engineering or land surveying assignment in a specific technical field of engineering or land surveying which cannot be otherwise resolved to the Board's satisfaction, the Board, either upon request of the Engineer or Land Surveyor or by its own volition, may require him to submit to an appropriate examination as determined by the Board.